

## Part I: Overview of the Dispute Resolution Mechanisms

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## **PART ONE**

### Overview of the Dispute Resolution Mechanisms

#### **A. How the Court System is Used as Dispute Resolution Mechanism**

##### **1. Overview of the Court System and the Current Situation Regarding the use of Courts**

###### **(1) The current situation of judicial system**

An independent and fair judicial power is crucial to the effectiveness of the market economy, the rule of law, and social justice. China's reforms are going through a period of structural adjustment, which must be backed up by an effective and fair judicial system. In China, the judicial authority over civil, administrative and criminal cases is exercised by the People's Court. In the judicial proceedings, the People's Court administers justice independently according to law, subject to no interference by administrative organs, organizations or individuals. Furthermore, the People's Court shall base itself on facts and take the law as the criterion.

Chinese courts hear 5.2 million criminal, civil, economic, and administrative cases annually. Chinese Courts are supposed to deal a harsh blow to serious crimes that threaten social stability, to readjust the relationship between civil and economic affairs and eliminate social contradictions, and to guarantee the smooth implementation of major reform measures.<sup>1</sup>

As China is moving towards the “litigious society”, the increasing litigation is classified into three categories, namely: civil and commercial cases, administrative cases and criminal case. The trial of civil and commercial cases is governed by the Civil Procedure Law of 1991, and relevant substantive private law, the trial of administrative cases is governed by the Administrative Procedure Law of 1989 and relevant substantive administrative law, and the trial of criminal cases is governed by the Criminal Procedure Law of 1996 and relevant substantive criminal law. Among other things, civil and commercial cases are the most predominant categories in terms of workload, including but not confined to contracts, torts, financial disputes, intellectual properties, State-owned enterprise reforms, farmland

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<sup>1</sup> Xinhua, “Courts ordered to help economy grow”, China Daily, July 6, 1998.

contracting, agricultural development, real estate, labour disputes, etc.

China began to pay more attention to judicial justice issues in the autumn of 1997. But the current judicial system is lagging behind in the implementation of these laws and regulations, and some malpractice still occurs in the courts. The judicial shortcomings include the judicial corruption, ineffectiveness of the judiciary, and lack of independence of the judiciary. Judges' expertise should be further improved. Some of the judges abuse their power, severely damaging justice of judicature, and tarnishing the reputation of the courts. It is necessary to improve the examination and qualification system for judges so as to raise their competence. Rampant regional protectionism is one of the judicial shortcomings. The fact that local courts do not operate on an independent basis is the major cause of this regional protectionism. In terms of personnel, funds and equipment, these courts are administrated by local governments. Under the current Organic Law of the People's Court, judges are selected by local People's Congresses. Some local governments, in an attempt to protect local interests, seek countermeasures against national law. This has resulted in unjust practices in some areas.<sup>2</sup> It threatens to tarnish the dignity of Chinese law and the image of courts. Worse, it may shake Chinese people's faith in the rule of law. This problem needs a timely reform to ensure independence of judicial activities, and promote market economy.

To safeguard the independence, effectiveness, accountability, honesty and cleanness of the judiciary, China has started reforming its judicial system. Judicial reforms are also an important part of the legal and political reforms in China. Without such reforms, the market economy will be in danger of foundering. Of course, economic analysis can be used to help analyse judicial systems so as to advance the current judicial reform.

## **(2) Strategies against judicial corruption**

In recent years, some judicial officials abused their power for the sake of money or gave unfair judgement for personal revenge or interests, including taking bribes, corruption, embezzlement of public funds, and dealing with cases in a manner contrary to the law.<sup>3</sup> In Hei long jiang Province, for instance, judges have been punished for such malpractice. Between 1993 and 1996, sentences given in 438 court cases were found to be erroneous and 460 judicial officials were penalised as a result.<sup>4</sup> Their misdeeds have invited public

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<sup>2</sup> "Legal reform to keep pace with market", China Daily, February 20, 1998.

<sup>3</sup> Xinhua, "Judicial officials", China Daily, July 30, 1998.

<sup>4</sup> Dian Tai, "Wei calls for fight against corruption", China Daily, July 30, 1998.

complaints and tarnished the image of China's judiciary system. A strong public opinion is growing to fight against the abuse of power and corruption in the judicial sector, and develop a sounder system to weed out the roots of corruption in law enforcement departments.

To enforce internal supervisory mechanisms in courts and ensure justice, to give innocent people the power to redress injustice, and to discipline the judges, the Supreme People's Court issued in 1998 a new punishment regulation regarding malpractice in trial procedures to safeguard judiciary justice, according to which judges shall be put under investigation after they are found to have intentionally broken the law in court trials or carried out court verdicts and unintentional legal offences resulting in serious consequences. The new regulation is applicable in both substantial and procedural laws, intentional or unintentional violations of the law, and both ongoing and past illegal activities.

The Supreme People's Court of China set up a reporting centre in May 1998 to handle calls and mail regarding judges in the supreme court, provincial higher people's courts and intermediate people's courts. Major cases to be handled by the centre will include embezzlement, taking bribes, abusing power, concealing or forging evidence, leaking secrets, unlawful coercion, dereliction of duty and illegal collection of money.<sup>5</sup>

Recently, there also have been cases in which the court retirees immediately got themselves re-employed as counsels. They used relations forged during years of working in the field to influence the judicial procedure and outcome. The Supreme Court prohibits retired judges from acting as defence lawyers or legal representatives in the region of their former service within three years of their retirement. According to a rule issued by the Higher People's Court in Yun-nan Province, the plaintiff and defendant are entitled to question the qualifications of legal representatives. Violation of the regulation will bring the case to a second trial.<sup>6</sup>

The top priority in the campaign against judicial corruption is to rectify the judicial discipline and working style, and re-select the leadership of the courts at different levels, in a bid to ensure a clean and disciplined court system. In 1998, Courts across China corrected 11,563 error-laden cases that were tried before 1998 and punished 2,512 judges. The Supreme People's Procuratorate punished 1,215 prosecutors, including the chief and a deputy chief of the Anti-Corruption Bureau under the Supreme People's Procuratorate. The chief, Luo Ji, was removed for depositing money confiscated in a case into a bureau account. The deputy chief,

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<sup>5</sup> Briefs, Reporting center, China Daily, May 12, 1998.

<sup>6</sup> Wu Jiachun, "Call urges judicial fairness", China Daily, March 13, 1998.

Huang Lizhi, was removed for accepting a dinner invitation from a suspect in a case.<sup>7</sup> China appointed 594 new chiefs and deputy chiefs of anti-corruption bureaux at county and prefecture levels nation-wide in the second half of 1998 as part of its effort to curb judicial corruption. The appointments were made to replace former chiefs who had failed to pass a nation-wide examination and assessment survey, and to fill existing vacancies. As part of the campaign, 1,332 new presidents and vice-presidents of county and prefecture-level procuratorates were installed to fill vacancies left by those who had been demoted.<sup>8</sup> To investigate cases of judicial corruption, the Supreme People's Court appointed ten prestigious judges as superintendents who will be responsible for offering advice in handling major, difficult or misjudged cases. They are also authorised to investigate major issues concerning judicial corruption in the courts, as well as cases involving parties from different jurisdictions. They are required to forward reports and suggestions based on their investigations to the Supreme People's Court.<sup>9</sup>

Another critical issue closely connected with judicial corruption is wrongly handled cases arising from authoritative judicial practice. During a revision of more than 4.41 million cases of various kinds in the first 10 months of 1998, 85,188 cases were deemed wrongly handled. Among them, 9,395 cases were corrected. The rest are being dealt with, according to the Supreme People's Court.<sup>10</sup> It would produce stronger public criticisms if the occurrence of wrongly handled cases could not be prevented and substantially reduced. The goal may be achieved through legitimate procedures, accurate verification of facts, good evidence, clearly stated judicial documents, and accurate and convincing applications of the law. It is essential to establish a system for investigating and prosecuting anyone who is held responsible for unjust or misjudged cases.

According to a regulation promulgated by China's Supreme People's Court, judges misjudging cases or breaking the law in making their judgements have begun to be punished from September 1998. The ultimate aim of the regulation is to improve the supervision system within the people's courts and ensure that justice is safeguarded. The regulation applies to all judges, including presidents of the courts, presiding judges and adjudicative personnel. People's courts have the power to determine whether a case handled by its personnel is

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<sup>7</sup> Xu Yang, "NPC considers amendments", China Daily, January 30, 1999.

<sup>8</sup> Xinhua, "Anti-corruption chiefs named", China Daily, January 16, 1999.

<sup>9</sup> Shao Zongwei, "Reform brings new supervisory judges", China Daily, October 31, 1998.

<sup>10</sup> Shao Zongwei, "Judicial Reforms Outlined", China Daily, December 3, 1998.

misjudged or not according to relevant regulations and laws. Judges held responsible for misjudging cases will receive a disciplinary punishment. Those who have committed a crime in the process will be dealt with accordingly by judicial departments. The investigation of violations of trial procedure laws cover past and present infringements. China's Supreme People's Procuratorate issued a similar regulation covering China's procuratorial organs in late July 1998. Both rules are significant in building up a system for investigating misjudged cases.<sup>11</sup>

### **(3) The far-reaching impact of open trials and live court broadcasts on judicial reforms**

According to the Chinese Constitution and laws, except for three kinds of cases -- those involving national secrets, privacy and minors -- all cases should be tried openly. The verdicts of the above-mentioned three kinds of cases must also be announced publicly. To conduct public trials means to allow ordinary people including media reporters to attend court trials. This practice has proven effective in many countries to prevent lopsided adjudication, lax enforcement of necessary judicial procedures, and prejudicial judgements against the accused. But in practice, it has not been fully followed by many local courts, and court proceedings were not publicised until a few years ago.

Of course, for many years, some courts have opened their trials to only a certain number of visitors who hold a special pass issued by the courts. At the same time, the formality required to apply for the pass is usually complicated, which keeps away a great number of visitors. In cases that require the court to open session more than once, many courts choose not to inform the public of the schedule. What is more, some local courts say they do not have courtrooms big enough to accommodate all visitors. As a result, ordinary trials are usually conducted in the presence of a very small number of visitors.

According to current Constitution and legislation, every Chinese citizen has the right to information, including the right to know the truth about any case. However, this right can only be realised if China's courts conduct trials openly before the watchful eye of ordinary citizens. If China is to establish a sound democratic and legal system, China's courts must conduct their proceedings openly, in accordance with the law.<sup>12</sup>

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<sup>11</sup> Shao Zongwei, "New rules improve judicial safeguards", China Daily, September 4, 1998.

<sup>12</sup> "Trials should be conducted in public", China Daily, February 6, 1998.

### **a. Opening court trials to the public**

China began to reform its judicial procedures in 1996. Conducting an open trial has been a major requirement of the reform. But no regulations have been stipulated to punish those who go against judicial principles. Perhaps this is the reason the principles are being overlooked. Some law enforcement officers and judges are not sure about their ability to make the right judgement in certain cases. Furthermore, many courts fear that the participation of ordinary visitors, especially media reporters, may make trials complicated. That is the main reason for the unpopularity of public trials.

Xiao Yang, president of the Supreme People's Court, has pointed out that courts must consciously put themselves under the scrutiny of the public eye and that the "public trials" stipulated in the Constitution must be carried out.<sup>13</sup> Starting from June 10, 1998, Chinese citizens above the age of 18 have been able to audit any public trials held in the Beijing No 1 Intermediate People's Court. All that is required is to show an ID card. By doing that, the court has become the first intermediate court in China to allow its workings to be viewed. On the same occasion, journalists are allowed to report any cases tried publicly by the court, provided that their reports are accurate and responsible. For this purpose, an attention-grabbing screen of 200,000-yuan (US\$24,096) was set up at the gate of the Beijing No 1 Intermediate People's Court, listing the cases to be tried in court, in full view of an interested public. More and more local courts are beginning to permit citizens aged 18 or above to attend most court hearings.

Open trials have a far-reaching impact on propelling judicial reforms and ensuring the integrity and justice of the legal system. Open trial is the most direct, widespread and forceful kind of supervision. It can increase judicial openness and transparency, prevent darkroom operations, and ensure that justice is served. One of the major reasons for the public complaints about the courts is that the trials are secret and not transparent. The public have an opportunity to observe and supervise judicial activities. This can curb or eliminate interfering factors such as personal favours, power, and money. It is an effective way to protect judicial independence, and to impose pressure on judges, urging them to improve their professional skills. It can also improve the legal awareness of the general public. Therefore, most legal and media specialists agreed that live broadcasts of courtroom hearings have a positive impact on China's legal reform, moving the system towards greater transparency.

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<sup>13</sup> Shao Zongwei, "Court trials now open to public", China Daily, June 11, 1998.

## **b. Live Coverage of Court Proceedings by Media**

Xiao Yang, president of the Supreme People's Court expressly and repeatedly declared in 1998 that as long as the media respects the facts and takes an impartial stand, live coverage of trials is always welcome. More than 40 television stations across China have broadcast live court proceedings. The first was Nanjing City Television Station in Jiangsu Province. The station began broadcasting court live in April, 1994 with a weekly programme titled "Courtroom Fax". More than 200 trials have been aired on the programme. The first nation-wide live broadcast of a court hearing by China Central Television (CCTV) on July 11 enjoyed an audience rating of 4.5 percent, higher than that of CCTV's noon news programme. The copyright infringement case involved ten Chinese film studios and was heard in Beijing's No. 1 Intermediate People's Court. A survey conducted in Nanjing reveals that many local residents are interested in the programme and frequently ask their friends to record it when they are unable to watch proceedings.<sup>14</sup> To date, at least eleven higher people's courts and 58 intermediate people's courts have begun live telecasts of trials to increase their openness and transparency.<sup>15</sup> Experts and lawyers are often invited to comment on the trials, and telephones are in place to allow viewers a chance to air their opinions.

A newly released 500-sample survey conducted by Beijing No 1 Intermediate People's Court indicates that 90.7 percent of its respondents think the trials they have attended are "just and fair". Among the 172 respondents who have participated in courtroom actions, 92.5 percent said the judges listened attentively to the litigants. By the end of 1998, some 2,630 people had attended trials with valid identification cards. Since December 1998, all courts in Beijing have opened their courtrooms to ordinary citizens. The survey also shows that 75 percent of respondents are satisfied with the performance of the judges. People were asked to evaluate the judges' manners, attitude towards litigants' ability to control the trial, and proper dressing.

Being exposed to the public's eyes, it is only natural for the judges to be cautious about every word they say. Since courtrooms have been opened to the public, the quality and efficiency of handling cases in court have improved. Judges usually pronounce verdicts at a later date instead of right at the end of the court session. Both the complexity of some cases and the large number of legal provisions have imposed difficulties on the timely

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<sup>14</sup> Xinhua, "Live trial coverage attracts viewers", China Daily, August 6, 1998.

<sup>15</sup> Xiao Shao, "Hot line improves media access to courts", China Daily, February 11, 1999.



pronouncement of verdicts. The quality of judges, which the court will routinely improve, is another reason for the late verdicts.<sup>16</sup>

To improve media access to courts, the Supreme People's Court (SPC) has opened a telephone hot line to be used by the news media this year. The hot line are managed by spokesmen of the court. It follows the opening of a hot line reporting on law enforcement advice and another one directed to spokesmen for the NPC. In addition to convening press conferences, the spokesmen will help reporters locate people they want to interview, clarify some facts and inform them of cases of public concern. At present, the SPC holds five to eight press conferences each year. Reporters may still cover court stories on their own. Chinese courts at all levels will gradually establish a spokesperson system.<sup>17</sup>

It should be noted that although most of the public have viewed the live broadcasts of court cases, some of them have not. A number of people are worried that this practice will disrupt the trial process and deter witnesses from speaking the truth, because the latter might be afraid of retaliation or exposure to the public. Some people believe cases shown to the public should be typical cases, and ought to be used to serve an instructive function. These cases should be tried by judges of high calibre. It is stipulated in China's law that any case may be open to the public, except when the cases involve national security or personal privacy. If witnesses do not want to be exposed to the public, blurring their pictures on TV can be an ideal substitute.<sup>18</sup> All these concerns show that there is still a long way to go before this vivid and direct practice can be accepted by the public.

It is also an open question as to how to avoid any negative impact of broadcasting proceedings. Some people argue that cases involving violent crime or a large number of victims and witnesses should not be broadcast, while others argue that class-suit cases, such as consumers suing a company, would be suitable for a TV audience. Defendant and plaintiff should be informed of the live broadcast beforehand and should not be forced into the project. The media should remember they are only playing a minor role in these live broadcasts. Media coverage of the cases should not improperly influence the decision reached by the courts. Televised discussions by experts should be held after rather than during the court hearing.<sup>19</sup>

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<sup>16</sup> Shao Zongwei, "Survey finds trials are 'just and fair'", China Daily, January 12, 1999.

<sup>17</sup> Xiao Shao, "Hot line improves media access to courts", China Daily, February 11, 1999.

<sup>18</sup> "Live show of trials raises law awareness", China Daily, October 2, 1998.

<sup>19</sup> Shao Zongwei, "Live court broadcasts benefiting legal reform", China Daily, October 21, 1998.

To fulfil the basic principle of the Chinese constitution of public trial, it is more crucial to improve people's legal awareness and judges' professional level rather than focusing on the limited space of the courtroom.

#### **(4) Reforms with the lay assessor system**

The people's lay assessor system is an important part of the judicial system. The jury system was introduced to China at the beginning of this century, but ended with the fall of the Qing Dynasty (1644-1911). <sup>20</sup>China inherited the people's lay assessor system from the former Soviet Union. People's lay assessors had been instituted in regions controlled by the Communist Party of China before the founding of New China in 1949. China's first constitution in 1954 made a clear provision for such a practice in China's judicial system. However, the system was short-lived, falling victim to the “Cultural Revolution” (1966-1976). Although the status of the system was re-established in the 1978 constitution, it is only recently that it has again been given due attention. <sup>21</sup>The Supreme People's Court has proposed to the Standing Committee of the NPC to draft laws to regulate the selection, rights and duties of lay assessors.

Unlike the jury system practised in Western countries, Chinese lay assessors share equal rights and duties with the judges in court. Forming a collegial bench with judges, they play a vital role in rendering trial judgements by a majority vote of lay assessors. They provide an effective channel for the people to participate directly in judicial activities and conduct supervision of the judicial activities.

Some courts in China have hired experts in special fields to function as lay assessors. The Beijing No 1 Intermediate People's Court started to hire IPR rights academics as lay assessors a year ago. The courts are currently paying more attention to lay assessors' proficiency in their individual fields than to their knowledge of law. This helps judges to determine the facts of a case. <sup>22</sup>

The people's lay assessor system should be further improved. People's lay assessors must have a certain educational level and have acquired some legal knowledge. Some local regulations state that people's lay assessors should at least have graduated from high school. Many legal professionals maintain that in cities like Beijing and Shanghai, lay assessors

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<sup>20</sup> It is also argued that China may experiment with juries in the reform of its trial system.

<sup>21</sup> Shao Zongwei, “Foundation for reform of assessor function set”, China Daily, December 4, 1998.

<sup>22</sup> Zong Wei, “Awareness of laws, legal education vital to system”, China Daily, December 4, 1998.

should have a college education. Since most lay assessors have no systematic legal education, they feel intimidated in front of judges, especially if disagreements arise. This often results in assessors just listening to trials without making their own judgements. Lay assessors should be encouraged to make their independent judgement, and deliver their opinion in good faith.

It is necessary to improve legal education to ensure that judicial power is vested in the right hands. While lawyers must pass strict professional examinations, many judges and procurators do not have to. In this situation, judges could easily reach the wrong verdict, while paying little attention to lawyers.

As to other issues concerning the internal judicial structure, the powers of collegial benches (made up of three judges) and single judges are expected to expand, and the function of judicial committees will be limited to difficult major cases only. The practice will transform the role of the chief judges and presidents of courts from ratifying court judgements to ensuring proper trial conduct by all parties to a case.<sup>23</sup>

#### **(5) Reforms with the township courts**

The implementing of the rule of law in the rural areas is an important part of the rule of law. There are 17,411 township courts in rural areas. Township courts are a branch of the county-level courts and are independent of township governments. The courts have a lot to do to help China's 900 million farmers solve problems arising from renewal of farmland contracts and the development of the rural economy. They handled 50.27 percent of all first instance cases in China's courts in the past five years from 1993 to 1998.

However, there are still problems at different governmental and judicial levels in building up township courts. Although they are not a part of the township Party committee of township governments, some township governments have used court staff as government employees. Some court arrangements could affect the outcome of trials.

China's Supreme People's Court has urged the courts to stamp out such malpractice, to stop getting involved in government affairs that are not part of their legal duties, and to conduct their activities in accordance with the law. It is necessary to formulate rules to rework China's to strengthen the judiciary's role, so as to help stop corruption in it and help further effect law and order in rural areas by standardising the operations of township courts, their governance, and their trial procedures.<sup>24</sup>

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<sup>23</sup> Shao Zongwei, "Judicial Reforms Outlined", China Daily, December 3, 1998.

<sup>24</sup> Xinhua, "Legal reform touches on township courtrooms", China Daily, November 30, 1998.

## **(6) Improving efficiency, especially speeding up litigation resolutions**

Efficiency is critical to judicial justice. According to Article 135 of the Civil Procedure Law of 1991, the trial of first instance shall be concluded within six months dating from the acceptance of the plaintiff's suite. According to Article 146 of Civil Procedure Law of 1991, the trial of first instance using the simplified procedure shall be concluded within three months dating from the acceptance of the plaintiff's suite. According to Article 159 of the Civil Procedure Law of 1991, the trial of second instance shall be concluded within three months dating from the acceptance of the party's appeal. Thus, it takes the parties nine months to get the final court rulings. However, both courts of first instance and courts of second instance are entitled to prolong the trial for due cause. In practice, some corporations or individuals need two or three years to reach the final court rulings. It has been reported that courts of second instance have taken around two years to deliver the final court ruling, requiring the court of first instance to rehear the case. This means that the plaintiff and the defendant had to follow another circle of trial including first and second instances.<sup>25</sup> It is urgent to speed up trials, reduce the judicial cost and improve the judiciary effectiveness. The Supreme people's court has realised that exceeding the time limit for concluding trials is a violation of the procedural law, and should be given the same attention as the correction of wrong judgements. During the first ten months of 1998, courts in China handled more than 4.3 million new cases and concluded more than 3.82 million.<sup>26</sup>

To improve judiciary effectiveness, it is necessary not only to create awareness among judges of modern, effective practices, but also to equip the office facilities with modern technologies. Some courts, including Beijing's Higher People's Court (BHPC), have launched the construction of the Court Computer Information Network. The project of BHPC will cost about 60 million Yuan (US\$7.228 million). The network is going to include a supporting system especially for presidents' decision-making, a lawsuit information system, an office management system and a public information system. It will connect Beijing's more than 30 courts from municipal to county levels. Beijing sees an increase of 10,000 to 15,000 cases every year, and its courts have already run out of space for additional officials. The courts expect this network to greatly raise their efficiency by freeing them from a tremendous amount of manual operations presenting a looming threat to judicial efficiency. Beijing

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<sup>25</sup> Chijian, "A time-consuming suite", *Democracy and Law*, Vol.8, 1998.

<sup>26</sup> Shao Zongwei, "Judicial Reforms Outlined", *China Daily*, December 3, 1998.

residents will expect to get quick judicial consultation through the network, which will also greatly improve judicial transparency by releasing typical cases and trial results, and receiving related inquiries.<sup>27</sup>

To offer effective and timely judicial remedy to the consumers in vulnerable positions, it is feasible to establish consumer small claims courts or general small claims courts in China. Some local courts in Suihua region, Heilongjiang Province and Changde City, Hunan Province, have experimented with establishing special courts to handle the cases concerning consumer disputes. The author believes that it is more reasonable to establish the small claims courts in China, covering not only the consumers' small claims, but also other small debt claims based on either contract or tort.

### **(7) Measures against unsatisfactory enforcement of judgements**

In China, the biggest danger threatening the dignity of the rule of law is the fact that it has not been possible to enforce a considerable number of rulings in civil law and commercial law cases. According to the Supreme People's Court, nearly one million cases with a total value of 190 billion yuan (US\$22.9 billion) were pending throughout China by September 1998. According to high court statistics, the national incidence of unexecuted cases now stands at 30 percent per year. In some courts, the backlog of adjudicated but unresolved cases has risen to a stunning 60-70 percent of the annual caseload.<sup>28</sup> In July 1998, Beijing had 9,882 not-enforced court decisions. Fifty-seven percent were civil cases, while 32.6 percent were commercial ones. The cases involve judgements valued in tens of billions of yuan. Compared with district courts, the city's higher and medium people's courts have had far more not-enforced court decisions, because of more complicated procedures and larger amounts of money involved. For several years, not-enforced court decisions have continued to damage the prestige of the law and have caused widespread criticism.<sup>29</sup>

The problem with the enforcement of court decisions did not appear until the late 1980s, when cases awaiting resolution peaked in many courts across China. The situation was so bad that specific enforcement divisions had to be established in courts at all levels to cope with the problem. The debtors often try every means to conceal their real financial situations and put off repayment as long as possible. Some scofflaws have even used violence against law

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<sup>27</sup> Tang Min, "Network to help courts in cases", China Daily, October 19, 1998.

<sup>28</sup> He Sheng, "Courts face hurdles in backlog", China Daily, November 30, 1998.

<sup>29</sup> Tang Min, "Beijing to speed up judgment enforcement", China Daily, September 10, 1998.

enforcers. Since August 1998, more than 30 incidents have been reported in Fujian Province in which about 30 law enforcers were injured during their attempts to resolve cases. Violence against law enforcement officers has become an increasingly serious problem. Four court police officers have been killed during the process of execution in the past three years.<sup>30</sup>

Local protectionism is an important factor in the context of the increasing number of not-enforced cases. It is not uncommon for local governments and local people's congresses to intervene in execution. They either exert their influence from behind the scenes or stand by the culpable litigants in public. Jilin provincial government has reportedly announced a list of 94 major enterprises in its province slated for "special protection", saying they are free from any liability in court-ordered debt collecting actions. There are probably more protected enterprises at the prefecture and county levels. What makes things even worse is that some local courts have even found themselves confronting local police and local procuratorates as they tried to carry out their duties. In extreme cases, local police have even clashed with judges or taken away the goods confiscated by the court. More than 50 such cases have been reported to the Supreme People's Court since 1992. The impetus behind these clashes usually comes from local establishment authorities.<sup>31</sup>

Meanwhile, the lack of a detailed, unified regulation over court enforcement also contributes to the current difficulties. For example, the provisions on the execution of verdicts in the civil procedure law seem a bit too simple to avoid a variety of interpretations. Many cases also result from a poor level of awareness of laws and a lack of a belief in the rule of law among both the litigants and those who could have a say in law enforcement.<sup>32</sup>

In December 1998, the Supreme People's Court issued a document concerning how to deal with resistance to execution of laws. It empowers the local courts with greater authority and provides practical measures to defend the law's honour. The Supreme Court is now launching a special training course for the senior judges responsible for the enforcement of judgements.

To enforce civil court orders, local courts have begun to take tough actions against debt repudiators who refuse to pay overdue court-ordered debts despite having the economic ability to do so. Initially, names of the repudiators are being published in the local press in an attempt to bring the problem to the public's attention. If the repudiators continue to ignore the

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<sup>30</sup> He Sheng, "Courts face hurdles in backlog", China Daily, November 30, 1998.

<sup>31</sup> Id.

<sup>32</sup> Id.

court, executors from the courts may enforce compliance. Local media have given support to the campaign by publicising debtors' lists over the last two months. These tough actions have proven effective in South China's Guangdong Province, including Guangzhou, Zhan-jiang, Shenzhen, Dongguan and Foshan. For example, most of the 112 enterprises and 16 individuals whose names were publicised by Guangzhou Intermediate People's Court in the press have paid 520 million yuan (US\$62.65 million) in overdue debts, accounting for 92.8 percent of the total.<sup>33</sup>

In early 1998, Beijing's courts launched a mass campaign to ensure that debtors cannot repudiate their obligations. 170,000 yuan (US\$20,482) in outstanding debts was repaid within one day in Fengtai District People's Court.<sup>34</sup> Haidian Court announced a second order on July 17 to detain those who refused to carry out the court's decisions. On May 22, Haidian Court publicised the names of 54 units or individuals refusing to carry out court decisions involving more than ten million yuan (US\$1.2 million).<sup>35</sup> In addition to making the name list of debt repudiators public and compulsory means of enforcement such as detention, some local courts are restricting the daily consumption level of debt repudiators. This has also proven effective.

## **2. Parties viewpoint of the Court System and the Current Situation Regarding the Use of Court**

To assess how parties view the court system and what would affect their decision to use the court as a mean to disputes resolution, we must first review the power position of the court system in the power map.

In accordance with theories embodied in the Constitution and laws of the People's Republic of China, the forms of state power in China can be portrayed as "One Mother and Three Sons", the legislative authority of organization of state power, the executive power of organs of state administration produced and supervised by legislative power, the judicial power of people's courts and the procuratorial power of people's procurators. Among the three powers in the western sense, the power of courts is the most important judicial power, and in China, the power of courts is secondary to the legislative authority, while parallel to the executive power and procurators power. Theoretically, power is based on rationality and

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<sup>33</sup> Wang Rong , "Campaign launched to protect creditor's rights", China Daily, September 11,1998.

<sup>34</sup> CD News, "Courts pursuing Beijing debtors", China Daily, September 11,1998.

<sup>35</sup> Xinhua, China Daily, July 28,1998.

justice, however, in the actual distribution and operation of power, interest is the foundation of the well-known power. Therefore, even for the western countries strictly adhere to the “separation of powers”, the powers divided in theory and the powers prescribed by law are always different, and the powers provided by law and the powers really operated are even more diverse, let alone the divergence between the theoretical powers and the real powers.

### **(1) The constitutional status of people’s courts**

Constitution is the law for allocation of state power. The constitutional status of courts in China is reflected in the stipulations of the Constitution of the People’s Republic of China. Articles through 123 to 128 in the 1982 Constitution determine the constitutional status of Chinese courts: The people’s courts of the People’s Republic of China are the judicial organs of the state; The people’s Republic of China establishes the Supreme People’s Court, the people’s courts at various local levels and military courts; The people’s courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual; The Supreme People’s Court is responsible to the National People’s Congress and its Standing Committee; local people’s courts at various levels are responsible to the organs of state power which created them. People’s Courts are the organs that exercise the state power to adjudicate in China. They are independent to executive organs and procurators and are responsible to organs of state power while supervised by them.

### **(2) The Relationship Between People’s Courts and other State Organs**

#### **a. The relationship with legislative organs**

The relationship between people’s courts and legislative organs is firstly capsulated in the provisions of the Constitution. The Constitution of the People’s Republic of China postulate that: the National People’s Congress has the power to elect and remove the president of the Supreme People’s Court; the Standing Committee of the National People’s Congress exercises the power to supervise the work of the Supreme People’s Court and to appoint or remove, at the recommendation of the President of the Supreme People’s Court, the Vice-Presidents and Judges of the Supreme People’s Court, members of its Judicial Committee and the President of the Military Court; local people’s congresses at and above the county level have the power to elect and recall the presidents of people’s courts at the corresponding level; the standing committee of a local people’s congress at or above the county level supervises the work of the people’s court and decides on the appointment or removal of functionaries of people’s courts



within the limits of its authority as prescribed by law. The Supreme People's Court is responsible and reports on its work to the National People's Congress and the Standing Committee of the National Congress, while local people's courts at various levels are responsible and report on their work to the people's congresses and their standing committees at corresponding levels.

#### **b. The relationship with administrative organs**

The relationship between the people's court and executive organs is also provided for by the Constitution. The Constitution of the People's Republic of China established a political system of "One Government and two Judicial Institutions". Thus, for the power distributed by the Constitution, Chinese Courts and executive organs are parallel. Their personnel are elected, appointed or removed by organs of state power and they are both responsible to organs of state power. However, in the actual operation of Chinese political system, the intrinsic defects incarnated in the system caused the divergence between the provisions of the Constitution and laws and the reality. The details of the real relationship between the judiciary and the administrative organs are listed as follow: 1. The whole system of Chinese judiciary has no centralized budget and financial allocation by its own, consequently, the financial allocation for infrastructures, facilities, administrative fees and salaries of judges in people's courts at various levels directly flow from fiscal expenditure at the corresponding levels; 2. The judiciary does not have its own force for coercive execution, such as judicial police to enforce any decision by courts. Therefore, whenever the courts intend to fully fulfil their impartial decisions, they have to turn to public security police at the corresponding levels; 3. According to procedure laws, executive organs have the obligation to help accomplish the item relevant to law suits mandated by courts, so it is difficult for the trial and other activities of courts to strictly obey to the provision of the Constitution as "not interfered by any administrative organ". The financial condition logically requires courts to take into consideration the relationship that is not laid down by laws or even illegal relationship with the administrative organs at the corresponding level.

#### **c. The relationship with people's procurators**

The relationship between courts and procurators is not only embodied in the Constitution, but in organic law, procedure law and other relevant laws. First of all, as far as the legal status is concerned, procurators are equal to courts. Both of them are elected or appointed by organs of state power, responsible to organs of state power and supervised by organs of state power. Furthermore, as to the actual exercise of power, their relationship is mainly incarnated in the treatment of criminal cases. In the light of the article 135 of the Constitution of the People's

Republic of China, the people's courts and the people's procurators, in handling criminal cases, divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other to ensure the correct and effective enforcement of the law.

#### **d. The relationship with police organs**

The power possessed by police organs is a kind of executive authority. From the perspective of legal status of powers, the power of police organs should not be equal with the power of courts because the latter is directly mandated by the Constitution. Considering the regulations of law, their relationship is also mainly reflected by the way of tackling criminal cases, similarly, pursuant to the article 135 of the Constitution, in handling criminal cases, the people's courts and the police organs shall divide their functions, each taking responsibility for its own work, and they shall coordinate their efforts and check each other to ensure the correct and effective enforcement of the law. But in practice, police organs sometimes tend to be superior to courts in handling criminal cases because they are the "first hand" in cases of criminal investigations. Courts will have a hard time if a judgment is made in which the police office is the one who failed, for example, in administrative litigation, because police organs are not used to be sued and to be punished for its wrong doings.

#### **e. The relationship with organs of Communist Party**

Comparing the relationship of with state power, the organs of Communist Party enjoy a kind of special status. Therefore, it is dispensable for us to study the relationship between organs of CCP and other organs of state power when considering and analyzing various relationships of organs of state power. So is the situation for the power of courts. People's courts set up local entities of CCP and the courts are led by the committees of CCP of the corresponding districts. In China, judges are considered as governmental cadres. While CCP select, train and manage the cadres. Thus, people's courts are led by the committee of CCP given the fact that legally it is the people's congress appoint judges and procurators.

Bear this background in mind, it is true that people are using court more than ever. The reason, we must say, lay in the social change in the last more than 20 years.

Over 20 years of experience in this reform has acquainted us with a very interesting phenomenon; that is, reform in one area often triggers a chain reaction, making reforms in other areas inevitable. As a result of the all-round political, economic, social, and cultural progress China has made since the late 1970s, the question of judicial reform stood out as an outstanding social issue in the early 1990s. In short, after the problems of feeding and clothing the population were basically solved, the demand for social justice became salient,

and the place to seek justice was the courts. Yet, suddenly faced with such huge social responsibilities, the courts themselves were not well prepared. Problems with their system, their management, and the quality of their judges that developed under the old system kept the courts from being able to adapt to the social needs in a new situation. The public was not happy with the judiciary, and the image of the Party and the government suffered. This aroused the attention of the Party and state leaders to judicial issues. In his report to the 15<sup>th</sup> National Congress of the Chinese Communist Party, General Secretary Jiang Zemin officially referred to the task of judicial reform. The judicial organs themselves were also very enthusiastic about reform. There was an urgent need for them to improve through reform their image and their credibility in the eyes of the public and adapt to the new social demand. In 1999, the Supreme People's Court formulated an outline for a five-year reform that became a guiding instrument for China's judicial reform.<sup>36</sup> By then, the judicial reform was no longer a matter of concern only to politicians and legal experts, but also to ordinary people. It was no longer an issue of only political and legal dimensions, but also a question of sociological significance. It was no longer an issue of readjusting and improving the power structure, but also an issue of subjecting the people of China to determination of their rights and obligations in a fair and credible judicial system. Statistics below shows the increase of the caseload by court each year.

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<sup>36</sup> The final article of the <<Outline of Five-Year Reform Plan for the People's Courts>> clearly points out that the <<Outline>> is the plan of action for organizing and mobilizing people's courts at all levels throughout the country for judicial reform.

Cases filed and handled by courts since 1986:

year	Level	cases filed	cases handled
1986	first instance	1611282	1585674
	second instance	125362	121223
1987	first instance	1869989	1854478
	second instance	125362	143949
1988	first instance	2290624	2226043
	second instance	160660	157118
1989	first instance	2913515	2882103
	second instance	196257	191132
1990	first instance	2916774	2921806
	second instance	213000	208409
1991	first instance	2901685	2950880
	second instance	229690	230864
1992	first instance	3051157	3049959
	second instance	231907	236800
1993	first instance	3414845	3406467
	second instance	215408	219628
1994	first instance	3955475	3943095
	second instance	241129	239938
1995	first instance	4889353	4876157
	second instance		
1996	first instance	5312580	5682363
	second instance	323995	
1997	first instance	5288379	5673868
	second instance	347651	
1998	first instance	5410798	5864274
	second instance	380274	
1999	first instance	5692434	6232302
	second instance	438313	
2000	first instance	Not available	Not available
	second instance		

China Law Year Book since 1987. Note: Cases handled each year include some cases left from last year.

The social demand for using judiciary is shown, first and foremost, by the fact that the status of the judicial organs in state and social life is becoming more and more important, and the public's expectations are becoming higher and higher. We all know that in the first three decades after the founding of the People's Republic of China, there was basically no connection between the courts and the daily life of the people. In Chinese society there was almost no private property and every individual was deemed a "gear or screw" of the state machine. All social resources belonged to the state in the name of being publicly owned and all economic activities were deemed to be governmental functions. The state and public life

were highly unified and the government had full power to represent the people in exercising its power. Almost all social contradictions and conflicts were settled through administrative means and the position of the court in the social power system was so marginal that people viewed it as a shame to “go to court.” A person who had the experience of “going to court” was often alienated. China’s reform and opening-up have already led to changes in people’s way of life and the mode of social management. First, there is the reform and functional transformation of the state organs, enterprises, and establishments. The non-operational functions of a “unit” have gradually weakened, and the Party and government leaders are no longer charged with the responsibility of mediating or ruling on social disputes beyond their professional or political mandate. Second, there is the reform of the market economy. Individuals with no affiliations to any administrative “Unit” have emerged in the urban areas. They are totally on their own in making a living and are subjects in both the market economy and in legal relations. Third, there is the land contract system reform in the rural areas. The disintegration of the people’s commune has, to a certain extent, created a vacuum of social administration in the rural areas. Many peasants have left the farmland, which they had relied on for generations, for the city, forming a “wave of migrant workers.” Their relationship with their workplace is nothing more than that between an employee and an employer. They don’t have any protective “umbrella.” They have to protect their rights and interests through law. Even peasants who have stayed behind in the villages are no longer living under a rigid administrative system. They have gained a lot of liberty through land contracting, and have really become equal subjects of social rights and interests. The practice of “complaining to leaders when there is a dispute” is being replaced by that of “seeing you in court.” Being more “litigious” than one used to be is becoming a trend, and it is possible for anyone to have the need to resort to the courts someday. Statistics have shown that in the past 20 years, the number of cases handled annually by the courts in China has increased drastically. Courts are becoming an indispensable part of people’s lives. One great achievement in the development of China’s legal system in the past 20 years is that the relationship between the public and the people’s courts at all levels has become ever closer, that now it is possible for anybody to be involved with the court, either as a plaintiff or as a defendant. This is a new phenomenon of “governing the country according to law”: the court is increasingly becoming an institution for safeguarding social fairness, a place where the public pursues justice.

When we talk about dispute resolution mechanisms, It is important to look at the legal procedures that could facilitate people to appeal to courts system. If we say substantive justice

is the “soul”, then the procedural justice is the form by which substantive justice be administrated.

### **(3) General Judicial Procedures of People’s Court**

#### **a. Civil procedure**

The judicial procedures that people’s courts should obey in civil lawsuits can be mainly divided into following categories: procedure of first instance, procedure of second instance, procedure for trial supervision and retrial, special procedure, procedure for hastening recovery of a debt, procedure for publicizing public notice for assertion of claims, bankruptcy proceedings and procedure of execution.

The procedure of first instance includes ordinary procedure and summary procedure. The ordinary procedure hereof refers to the fundamental proceedings people’s court s commonly applies in civil actions. It usual consists of following stages: entertaining a case, trial in court and judgment. Summary procedure is the simplified ordinary procedure in the first instance of trial. Basic people’s courts and the tribunal dispatched by them follow the summary procedure when trying simple civil cases in which the facts are evident, the rights and obligations are clear and the disputes are trivial in character. The differences between the summary procedure and the ordinary procedure are that the former is flexible, simple and convenient in proceedings and is tried by a single judge alone. Therefore, summary procedure is not subject to the time limitation of various litigious stages and other formal requisites required in the ordinary procedure.

The procedure of second instance is composed of four stages: filing an appeal, accepting the appealing petition, trying the case on appeal and deciding in the form of orders.

Procedure for trial supervision and retrial is the procedure for people’s courts to internally scrutinize the legally effective civil judgments and orders.

Special procedure is the judicial proceedings that people’s courts apply in the civil cases of specific types. What it means by “ specific types”? first, those cases are not disputes over civil rights and interests, but over petitions for confirming certain legal facts; Second, the proceedings constituting special procedure are independent from each other; in principle, cases are tried by a single judge alone, and if there is a collegial panel, it shall be composed of judges, which excludes the participation of people’s assessors; Thirdly, the judgment of first instance is final; there is no litigation cost in this procedure; the time for trial is much shorter; and if there are errors in a legally effective judgment or written order, or a new situation appears, people’s court shall not retry the case according to procedures for trial supervision,

but pass a new judgment or order. There are two classes of lawsuit suitable for special procedure: cases concerning the qualification of voters and non-litigious cases. Non-litigious actions are largely cases concerning the declaration of a person as missing or dead, cases concerning the legal capacity or restricted legal capacity of citizens, and cases concerning the determination of property as ownerless.

Procedure for hastening debt recovery is a simple, direct and speedy procedure for urging a debtor to pay his debt.

Procedure for publicizing public notice for assertion of claims is the procedure whereby the people's courts may, according to the application submitted on account of legal particulars, issue a public notice for the unidentified parties to assert their rights within the legal period of time, and if no claim is asserted, it shall make an invalidating judgment on the basis of the application (that is, to declare the bill in question null and void).

Procedure for bankruptcy is the specific procedure people's courts apply, in accordance with the application of creditors or debtors, to distribute the bankruptcy property of the debtor to the creditors concerned pursuant to law, when the debtor is unable to repay the debts at maturity.

Procedure of execution refers to the procedure in which the execution organizations of people's courts, in the light of proceedings as prescribed by law, use the coercive state power and take the enforcement measures to execute the items laid down in the effective legal documents. And thus force the parties incurred obligations to fulfill their duties.

#### **b. Criminal procedure**

The procedure that people's courts apply in the criminal actions can be divided into procedure of first instance, procedure of second instance, procedure for review of death sentences and procedure for trial supervision.

Procedure of first instance includes general procedure and summary procedure. The general consists of the following stages: acceptance of a case, trial and judgment. It is applied in most cases of public and private prosecution. Summary procedure is the simplified general procedure furnished for adjudicating the cases in which the facts of crime are clear and simple, the evidence is sufficient and the sentence will be relatively light. Summary procedure can only be applied in basic people's courts. Compared to the general procedure, it has several characteristics: 1) the proceedings are simple and convenient; 2) public prosecutors may not present at the court to support the public prosecution; 3) the time period for trial is short; 4) cases are tried by a single judge alone; and 5) it can be transferred to general procedure, etc.

While procedure of second instance is roughly comparable to the procedure of first

instance, it also has its own features as follow: in the circumstances other than trials by a single judge, a people's court shall form a collegial panel to hear a case of appeal; public prosecutor shall appear in court; people's courts may or may not open a court session, but try the case by both reviewing the documents and investigations. Moreover, procedure of second instance has an important principle, that is, no appeal resulting in additional punishment.

Procedure for reviewing of death sentences is a kind of special proceeding pertaining to death penalty. Pursuant to Criminal Procedure Law and Organic Law of the People's Court, "death sentences shall be subject to approval by the Supreme People's Court; a case where an intermediate people's court has imposed a death sentence shall be reviewed by a higher people's court and submitted to the Supreme People's Court for approval; cases where a higher people's court has imposed a death sentence shall be submitted to the Supreme People's Court for approval; and a case which results in a death sentence with a two-year suspension of execution shall be subject to approval by a higher people's court. In addition, the Supreme People's Court may, when it deems necessary, authorize higher people's courts of provinces, autonomous regions, and municipalities directly under the central government to exercise the power to approve cases involving the imposition of death sentences for homicide, rape, robbery, causing explosion and others gravely endangering public security and disrupting social order. Procedure for trial supervision is a procedure with which people's courts internally supervise formal judgments and orders that are legally effective.

#### **c. Administrative procedure**

Administrative procedure can be divided into general procedure and procedure for trial supervision. General procedure consists of the following stages: accepting a case, trial in court and passing a judgment. Procedure for trial supervision is also the proceeding by which people's courts internally scrutinize legally effective judgments and orders.

#### **d. Special maritime procedure**

Special maritime procedure is the special proceeding applied by admiralty courts in maritime actions. Combined with the civil procedure, it comprises the judicial proceedings of admiralty courts and it is the only specific contentious procedure in China.

Special maritime procedure contains the following proceedings: procedure for security of maritime claim, which including procedure for detention and auction of ship and procedure for detention and auction of cargo in ship; procedure of maritime injunction; procedure for conservation of evidence; procedure of maritime guarantee; procedure of service; procedure of judgment, which consists of general procedure, summary procedure, procedure for hastening debt recovery and procedure for publicizing public notice for assertion of claims;



procedure of establishing funds for limitation of liability for maritime claims; procedure for registration and redemption of debt; procedure for publicizing public notice for priority claim to seagoing ships.

### **3. Problems of the Court System**

Generally speaking, people are not satisfied with the courts. There are many allegories to satirize courts and judges. A famous one is like this:

*A big hat on the head,  
take advantage from the plaintiff and then the defendant,  
after both of them paid,  
the excuse is that “our legal system is not perfect”..*

It is very true that the courts in China enjoy least respect and trust from the public compare with their colleagues in many other countries. Major problems can be listed below:

#### **(1) Independence**

It has been discussed for many years that the independence of Chinese court system is a major problem. From the power map provided above, one can see that the court system enjoys a very limited “independence”. In practice, it is even less because all the power organs want to interfere judicial matters because of personal and local interests.

Factors infringe judicial independence come from different ways. First is the traditional perspective over “Courts”. It is not Chinese legal tradition to give courts the independence its need to administrate social justice, and there was no such a thing as separation of powers. County governors judge cases themselves even though they are the executives.

After PRC was founded in 1949, the former Soviet Union had a strong influence over China’s system building and ideology construction. Judiciary was seen as something serves the interests of those who are not happy with Communist Party’s rule. With this bias, courts enjoy a very marginal position in the power structure. Any words proposed for independence could be taken as “ against the leadership of the Party.” Many were put into prison during 50-60’s just because they advocated for judicial independence. According to the constitution and other laws, the courts enjoy the freedom of “ independent trail”, not “judicial independent”, and it makes a big difference. If courts do not has an independent legal statue

and has to subject to interference from all parties, how could one expect them to be fair and just? Some of the interference is done under the name of “supervision”, maybe it is the most dangerous way because it covers interests or even corruption with legitimacy.

## **(2) The administrative nature of court management**

What we mean here is that there is no big difference as to the appointment of judges, their promotion, salary, retirement from those who are in civil servant post. To “make courts more like courts” has been a goal in recent year’s judicial reform, but problems are still there. First of all, all judges are considered to bear the responsibility as civil servants, especially in political sense, they are asked to remember all the political and party doctrines. They apply legal rule, and at the same time they must fulfill their political mission.

The internal structure of courts is also designed like administrative organs. For example, there has always been a director in each tribunal, and judges are lined according to their administrative positions. Of course the higher position judge enjoy the power to correct or direct judges in lower position. This means that judges are not equal, and sometime there could be something like “those who handle the case can not make the judgment, and those who did not handle the case make the judgment”. Usually, a judge must report his judgment after hearing a case to the tribunal director, and ask the comments of the director. It is great if the director agree with the judgment, but if he does not agree, then the trial judge must follow his reasoning or at least considering his opinion.

There is a unique institution in China’s court system, namely the establishment of the “Adjudication Committee”, which is a superior body over all tribunals. Courts at different level all have set up adjudication Committee, it composed leaders in courts, not necessary legal experts. According to law, it is suppose to discuss “hard cases and other important issues concerning adjudication”. It is more like administrative meeting within a institution but it makes judgment all the time. In many places, the range of cases that brought up to the adjudication committee is very broad.

## **(3) Financial support**

Most courts in China have financial difficulties with few exceptions like courts in economically developed areas. Local economic development is a key for court’s financial situation because they get their budget from local finance. The problem is not that courts have to share with other governmental institutions the economic statues, but subject to the direction of local government. They have to look up the faces of local governors, either administrative

or partisan in order to get enough budget. Sometimes courts and judges are put in a hard situation when the case tried involves local interests, or involves governmental organs, like in administrative litigation cases. “There would be no salary for you if we lost in this case” is a famous word from a local governor when he talk to a judge, telling him that he must make a judgment that supporting the party from their locality. Courts in poor areas do not have sufficient fund to meet the needs for handling cases, the priority for local authority is always something else. There has been proposals that the national finance covers budget for court system, then the difficulties comes from the gap between rich areas and poor areas since courts in rich areas do not want to loose the advantage.

#### **(4) Local protection**

Local protection has been an outstanding problem in China’s judicial system. It is such sever issue that threatening the unity of law and the public trust to the legal system. Local protection has many faces, the core of it is the judiciary protects local interest when performing the judgment instead apply legal rules fairly. For example, if one party of the litigation is from another region, then he probably will lost the case even though legally he is sound. In the case of enforce court rulings, local protection means the local court will not cooperate with courts from other region when it need support to get the payment. Studies showed that there is a big percentage of cases that could not be enforced.

#### **(5) Quality of judges**

There are 0.17 million judges in China. Most of them are working in county and district courts. Official statistics tell that up to 80% of them have a college education, but it is much less in fact. Legally trained ones are even lesser. According to Law for Judges, the qualification of judge was:

- 1) 23 years above;
- 2) support Chinese constitution;
- 3) good political qualification, professional qualification and good behavior;
- 4) good health;
- 5) law school graduates or graduates from other areas but with legal knowledge, plus 2 years working experiences; or 1 year working experiences if with a bachelor of law degree; no working experiences required if he or she has a master or doctor degree.

Sounds good. But in practice, there are many ways to cope with legal rules. Some courts would recruit people in without check their qualification, of course those who can get in must

have some kind of background. Retired military officer was a major source for judges in 70's and 80's, even 90's. They composed a big percentage among judges. A Great news is that from year 2002, there will be a nationwide examination for legal profession, including judges, but how to place those who are already there is still a problem.

As judicial reform going on, new problems with court system appeared. They are:

**First, the contradiction between strengthening supervision of the judiciary and the weakening of the judiciary that results from it.** When there are numerous problems with an organ of power and the public is not satisfied with it, the conventional wisdom of political science is to strengthen supervision of that organ. Under China's legal system, supervision of the courts has several dimensions. First, there is internal supervision, which basically means supervision of the court's adjudication work by the court itself initiated by its internal procedures or the appeals of the litigants. Second, there is supervision by the state legal supervision organs. The people's procuratorates are a state supervision organ for legal matters. They supervise, according to law, the adjudication work of the people's courts. Third, there is supervision by organs of political power, including the National People's Congress and the ruling political party. The National People's Congress is the source of judicial power and therefore naturally has the duty to supervise the courts. Supervision by the ruling political party is mainly exercised through the politico-legal committees at different levels. Fourth, there is supervision by the public.

Observed from a systemic point of view, we would believe that such a system of supervision has, at least legally, subjected the courts to multi-layer supervision and made it almost impossible for the courts to abuse their power. But the problem is that whether the supervision mechanism is effective is not determined by how perfect its form is. Sometimes one more tier of supervision may mean more corruption or greater systemic cost. Besides, the effect of a supervision system depends on the role of many factors, including systemic, social, ethical, and human factors. Those who supervise are known to the public as the "people watchers," but these "people watchers" themselves also need to be watched, perhaps more so. Yet, along with media exposure of judicial corruption and increased public discontent with the courts, people seem to suspect that the current supervision system is not adequate, and the logical next step is to create more mechanisms of supervision. In such a social atmosphere, to actively subject themselves to supervision has become, in itself, a demonstration of the courts' being "politically correct." As a result, we see that when the power organs or other departments put forward a proposal for a new method of supervision of

the courts, the courts will always issue a new document “accepting the supervision.”<sup>37</sup>

Accepting supervision is undoubtedly a good thing, but if supervision has already influenced the independence of the courts and their status as the ultimate judge of social disputes, then that supervision has deviated from its original purpose. Commenting on supervision of the courts by various organs, one judge wrote, “Supervision of individual cases through instructions has increased drastically through the years.” This supervision comes in various forms. “Some summon court personnel to give instructions on a case in person, some resort to oral instructions, some give instructions over the telephone, some write instructions on a slip of paper, some give instructions by writing opinions on an official document, and some give instructions in letters. Different people have different requirements. Some require reporting on the result in person, some require a report accompanied by case files, some require a report over the telephone, some require a written report, and some require the case be handled according to their instructions or opinions. Even with respect to the same case, some leaders want it decided this way, some want it decided that way; some want it decided immediately, some want it shelved or suspended.”<sup>38</sup> This judge’s comments reflect helplessness: “Sometimes a case has just been established or just tried or just entered into enforcement procedures, and the instructions from leaders are already here.”<sup>39</sup>

The purpose of supervision should be to enable the court to exercise its adjudication power more justly, not to let other power organs replace the judiciary in exercising adjudicatory power. If it is possible to have unjust judicial proceedings even under the checks of a multitude of systems, then allowing those who supervise to order or demand that the courts exercise adjudicatory power according to their will surely lead to even greater judicial injustice. One judge emotionally remarked that those who supervise sometimes “willfully give instructions or write opinions on documents without having a clear understanding of the case, or on the basis of hearing only one of the litigants, or proceeding from narrow interests. If the court does what it is instructed to do, it is acting against the law.

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<sup>37</sup> On December 24, 1998, the Supreme People’s Court promulgated <<A Number of Comments Concerning the People’s Courts’ Acceptance of Supervision by People’s Congresses and Their Standing Committees>>, listing 13 ways of accepting supervision. Articles 7 and 8 are responses to the demands by people’s congresses for supervision over individual cases.

<sup>38</sup> Feng Yunqiang, “Supervision of Individual Cases in People’s Courts Urgently Needs Regulating,” *Law Magazine*, No. 6 (1998), p. 31.

<sup>39</sup> *Id.*

If it doesn't, it is acting against the instructions of the leaders or the leading organs.”<sup>40</sup>

There are also problems in the supervision of the judiciary by people's congresses at different levels. Supervision of the judiciary by people's congresses is based on China's Constitution, but it should be institutional supervision through examination of reports, appointment and removal of officials, and issuance of regulating documents. It should not be supervision of individual cases, particularly not before the trial of the cases has even started. The National People's Congress once drafted <<Regulations on Supervision of Individual Cases>>, but they were put on hold during the course of deliberations. However, many localities have adopted their own versions of <<Regulations on Supervision of Individual Cases>>, thus legitimating supervision by people's congresses of individual cases handled by the court. The sources of cases subject to this supervision include “cases brought to the attention of the People's Congress by people's petitions or complaints; cases violating the law that are discovered during inspections, examinations, and reviews of the judiciary organized by the People's Congress; cases violating the law that need to be supervised by the members of the Standing Committee of the People's Congress or the deputies to the People's Congress; and cases violating the law that are handed down by the Standing Committee of the People's Congress at a higher level or submitted by the Standing Committee of the People's Congress at a lower level.”<sup>41</sup> In the supervision process, the investigative missions have the right to investigate, read case files, and interview or interrogate organs or persons concerned. “Those who fail to act on the supervisory opinions or recommendations of the Standing Committee of the People's Congress in accordance with law shall be investigated according to the law to determine their administrative or legal responsibility.”<sup>42</sup>

Such a supervision system has rendered the courts helpless to do anything but be humbly obedient to the opinions of the people's congresses with regard to individual cases. The annual meetings of the people's congresses have become an opportunity for the courts to “voluntarily accept supervision.” The judges put down the cases they are handling and humbly come to the meeting halls to solicit comments and make reports on their work. The purpose of all this is to win support of the deputies to the People's Congress for the work report submitted by the court. The possibility cannot be excluded that some deputies may in

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<sup>40</sup> *Id.*, p. 32.

<sup>41</sup> <<Regulations on the Implementation of Individual Case Supervision by All Levels of People's Congress Standing Committees in Guangdong Province,” adopted at the 26<sup>th</sup> meeting of the Standing Committee of the 8<sup>th</sup> People's Congress of Guangdong Province in 1997.

passing give instructions on some cases, in which case the courts can only “handle the cases carefully and make a report on their outcome.” The result of this is a weakened status for the judiciary. Sometimes the final judgment of a case is reached only after consuming a huge amount of judicial resources, but it can hardly be called the end of the case as long as one of the litigants can find his/her way to the leader of a Party, government, or people’s congress organ. A society needs courts precisely because courts can turn solving complicated social contradictions into a technical, institutionalized, and legalized procedure, so as to maintain social stability and the uniformity of the legal system. If the result of supervision is that the courts are turned into a tool at the service of those who supervise, then, even if we leave aside the possibility that those who supervise are themselves biased or tied in with local protectionism, even if their point of departure is wholly just, still courts unable to exercise their adjudicatory power independently because they are subject to the lead and direction of various supervision organs will harm not only the judiciary, but also China’s constitutional system itself.

**Second, the contradiction between the public’s image of and expectations for the judiciary and reform led by the courts themselves.** Who should be designing judicial reform? Who is the subject of judicial reform? Does judicial reform require an authoritative decision-making organ to carry out the meticulous planning of goals to be achieved by judicial reform? How can public expectations about the image and functions of the judicial organs be combined with concrete reform measures that respect the characteristics of the judiciary? These constitute another outstanding contradiction at today’s stage of judicial reform.

Looking back at the achievements of judicial reform, we have to give full credit to the enthusiasm and initiatives of the people’s courts at all levels. They have taken reform as their own duty and adopted many very meaningful reform measures within the scope allowed by the system. The Supreme People’s Court has set up a reform group and formulated the <<Outline of Five-Year Reform Plan for the People’s Courts>> that put forward specific requirements for reform of the courts at all levels for each year. The problem with this model of reform is, first and foremost, its inability to solve problems of a deeper nature, because reforms can only cure symptomatic problems due to limits on the scope of the courts’ power. For example, no solutions to problems such as the financial structure and recruitment system of the courts can be found in reform of the courts themselves.

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<sup>42</sup> *Id.*

Second, because China is a vast country with huge differences from region to region, the same reform measures may be subject to different standards in different places. Take the case of the reform of selecting presiding judges. Although the aim of this reform is to select judges of higher quality to become presiding judges so an elite of judges can be fostered, in the course of implementing this reform a variety of sub-standard practices have come into being. In some places with underdeveloped economies, the standard for selecting presiding judges has actually become how much income a judge can generate for the court.<sup>43</sup>

To designers of the reform at the Supreme People's Court, such a result is undoubtedly tantamount to "sowing dragon seeds only to harvest fleas." If the reform of selecting presiding judges could be carried out in combination with reform measures aimed at improving the financial situation of the courts, then many problems could be avoided. Unfortunately, the Court lacks the ability to coordinate reforms beyond its own powers.

Third, since reforms advocated by the courts themselves are very likely to proceed from their own immediate interests and needs, they may not be very helpful in achieving a fundamental solution of the problems and may instead increase the cost of future reforms. For example, in view of the fact that the compensation of judges at present is relatively low and for the sake of boosting judges' morale, the Supreme People's Court issued the <<Provisional Stipulations on the Ranks of Judges of the People's Republic of China>> and tried hard to rank judges within the framework stipulated by the <<Judges Law>> and link their remuneration with their rank. Such a reform is reasonable in view of the present situation, but it is not reasonable from a long-term point of view and may even run counter to the long-term ideal of judicial reform. An ideal judges system has to be one in which "there is no judge above a judge, nor any judge under a judge." There should be only one yardstick for measuring judges. Reforms of this kind can only serve to distance the courts from the ideal courts. Similar examples can also be found in judicial training. Judicial training is being done in countries all over the world. But the court should not become the principal entity for training itself. To provide the judicial system with qualified judges is the responsibility of universities and research institutes. They should be the provider of judges while the courts should be the user of judges. Now, our Judges College is affiliated with the courts and under the leadership and management of the courts. This has not only greatly

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<sup>43</sup> According to reports on <<Interviews and Discussion on Focal Questions>>, a TV program of China's Central TV Station, the amount of income judges generated for the courts was used as a criterion in selecting presiding judges in a certain county in Jiangxi Province. As a result, judges of higher professional qualities were not selected.



diverted the courts' energy, but also turned the judicial training program into a kind of welfare arrangement within the courts. Persons with no qualifications to be a judge can acquire those qualifications through brief training. One can even get promoted through training.

I believe that undoubtedly the courts should be active participants in judicial reform. But the courts cannot act as the designers of their own reform. Like other institutions, the courts are simply unable to go beyond their own limits. We need an institution that can design and promote judicial reform at a macro level. This institution should clarify the overall concept of judicial reform and have the ability to coordinate among various power organs. It should embody both knowledge and power and be equipped with a clear time-table. To play such a role, it is most desirable for a National Judicial Reform Committee to be established under the Standing Committee of the National People's Congress. This committee should include members of the judicial organs, scholars of law, and personnel from other relevant Party and government institutions such as the Central Politico-Legal Committee. This would be good both for drawing on collective wisdom and for coordinating various relationships. More importantly, such a committee could transcend departmental interests and put forward plans for judicial reform and supervise their implementation from the perspective of political structural reform.

**Third, the contradiction between the efforts of the judicial organs to professionalize and the fact that the judicial system is surrounded by the administrative system.** A major goal of judicial reform is "to make the courts more like courts." In China, this mainly means liberating the courts from their administrative structure and make the judiciary an institution for arbitrating social disputes that is totally different from administrative organs in staff composition, mode of work, and social mission. But the reality we are witnessing is that reforms to make the judicial organs more professional are surrounded by the administrative system. This means either the results of the reforms will be greatly watered down, or the reform process itself will become an administrative operation yielding only an administrative result. This has almost become an universal problem in judicial reform in recent years.

Again take the case of selecting presiding judges. Before the Supreme People's Court introduced its method of selecting presiding judges, courts in many places had conducted similar experiments, the subject of which was known in certain places as the "judge who presides over trial" (*zhushen faguan*). The fact that the Supreme People's Court finally settled on the title *shenpanzhang* ("the head of the trial") shows that the designers of this reform were influenced by the "administrative mentality" that favors a title strongly tinted

with the color of administration. *Zhang* (“Head”) means leader. Nothing is more numerous in China than “heads,” from head of a ministry to head of a group, giving a lot of people the feeling of being leaders over others. One of the tasks of China’s judicial reform is precisely to reform the “bureaucratic” and “hierarchical” internal structure of the court system. While the old administrative hierarchy is still basically untouched, a fixed position of the “head” or presiding judge has now been established. Although it has not been written explicitly in relevant documents that the presiding judge is an official with administrative power, we can see that the power given to presiding judges is mostly administrative rather than adjudicatory. For example, the presiding judge has “the power to appoint other members of the collegiate bench to handle certain cases,” “the power to ask the president of the court to submit to the adjudication committee cases on which the collegiate bench has significant differences,” and the “power to review and sign litigation documents,” etc.<sup>44</sup>

Whether you agree with it or not, the establishment of the position of presiding judge is actually adding one more ranked position between the judges and the internal structure of the court. Some of the judges who have been selected presiding judges are having their title *shenpanzhang* printed on their business cards to show that they are different from other judges.

**Fourth, the contradiction between reform based on concepts and reform aimed at solving immediate problems.** Judicial reform involves China’s current power structure. Therefore, any reform plan must be the product of meticulous design and consideration. Some reform measures are aimed at solving the most urgent immediate problems. Because such reform measures lack conceptual rationality, the more they are adopted, the more new problems there will be. For example, the fact that it is difficult to enforce the courts’ judgments has become an outstanding problem troubling our society in recent years. To solve such a problem, the courts have established enforcement chambers and, in some places, “enforcement task forces” under them as their enforcement muscle. In legal theory, enforcement is a kind of administrative action. Its effectiveness comes from the administrative mandate, which is of a totally different nature from the strictly designed judicial procedures. It is exactly because of this that under the current court administrative system, the enforcement chamber is most likely to become a tool for practicing local and departmental protectionism by local governments or other leading organs under the pretext of “maintaining overall interests,” “safeguarding stability,” or “protecting the authorities.”

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<sup>44</sup> <<Provisional Measures for the Selection of Presiding Judges of People’s Courts>>

Ordered by administrative authorities and for the sake of protecting local or departmental economic interests, the enforcement units of many courts are armed with guns and real ammunition when carrying out “sudden enforcement” or “forceful enforcement.” They sometimes freeze or reallocate litigants’ assets through forceful means or hold hostages. Some of their actions have even led to fatal incidents. Facts have shown that strengthening enforcement by the courts has created a situation in which “trial is not separated from enforcement.” This has not only diverted the energy of the judiciary, but also boosted local judicial protectionism.

The duty and function of courts is to make fair judgments. In a rule-of-law society, there should be a mechanism through which the courts’ rulings can be enforced automatically. My opinion is that although we cannot exclude the possibility that difficulties in enforcing certain cases are caused by unfair judgments, the main cause of difficulties in enforcement does not lie in the judicial organs, but rather in the broader environment for rule of law such as the lack of public respect for the authority of the judiciary, local protectionism, the trend toward localization of the courts, a weak sense of law on the part of litigants, etc. Solution of these problems requires a macroscopic strategy for the establishment of rule of law in the country.

**Fifth, the contradiction between reform plans designed by superior organs and different local realities.** There are thousands of grassroots courts in China which undoubtedly should be the subject of judicial reform. But very often the reality is that they cannot but passively accept reform plans from superior organs, some of which are divorced from the reality they are faced with.

Here we are facing a cruel paradox. On the one hand, we need conceptual reforms and need modernized judicial organs. On the other hand, China is still an agricultural state where 70% of the population still live in the countryside in a rural environment. The elements of a modern judicial structure, such as judicial independence, judicial professionalism, strict legal procedures, litigants’ responsibility for presenting evidence, and unbiased rulings by the judge, etc., which are serving as the points of reference to China’s judicial reform are the result of detailed division of social labor brought about by industrialization. The bulk of China is still a pre-industrial society. The mechanisms of dispute settlement in an agricultural society are different from those in an industrial society. The former focuses more on results whereas the latter stresses procedures. The former focuses more on reconciling different interests whereas the latter stresses rules. The former needs an arbitrator who is prestigious and well respected but not necessarily well versed in

law whereas the latter needs legalists who have undergone professional training. The former functions in a society where “people know each other” and the aim of dispute settlement is to “iron out” conflicts whereas the latter is in a society of “strangers” and the aim of dispute settlement is to allocate clearly rights and obligations. To build a modern judicial system in a rural society is the problem faced by more than three thousands grassroots courts at the county level in China.

#### **4. Direction of Judicial Reforms**

To forge an independent and strong judicial power through judicial reform is the necessary result of consolidating the constitutional position of the state adjudication organs. Under relevant stipulations of China’s Constitution, judicial independence means that when exercised in the state power structure and judicial system, the judicial power is in an independent position not subject to interference from any other organs. Over the years, the independent position provided to the courts by the Constitution has not been well safeguarded. This is one of the important reasons why we are carrying out judicial reform.

##### **(1) China needs a powerful judicial power**

In China’s power system, the judiciary is the weakest. Under the people’s congress system, the legislative power is the supreme power of the state, and is the mother of all powers. Both the judicial power and the executive power are generated by the people’s congress system, to which they are responsible and report. In theory, the judicial power is parallel to the executive power, but China’s premier, who is head of the state executive organ, is definitely not at the same level with the president of the Supreme People’s Court, who is head of the state adjudication organ, or the procurator-general of the Supreme People’s Procuratorate, who is head of the state prosecution organ. The executive power has the characteristics of being active, dynamic, and expansionary. It is ubiquitous and omnipresent. This is especially true of the executive power in China. The power system known to the public as the “big five” (i.e. the Party Committee, the Government, the People’s Congress, the Political Consultative Conference, and the Discipline Inspection Committee) has no place for the judicial organs at all. In the minds of the people, judicial organs are no different from government departments under the executive. The habit of referring jointly to the “police, procuratorate, and court” -- in that order -- demonstrates this point. The Party Politico-Legal Committee is the organ of the ruling party in charge of political and legal affairs. In many places, the Secretary of the Party Politico-Legal Committee is concurrently head of the Public

Security (police) Bureau. When the head of the police is in charge of political and legal affairs as a whole in his/her capacity as Secretary of the Party Politico-Legal Committee, the room for the independence and capacity of the courts is very limited.

Such a system has further weakened the position of the judiciary. The reason a society needs an independent and strong judiciary is that the society recognizes that it is impossible for people to reach the level of absolute truth. Therefore, when there is a conflict of interests in which one side cannot persuade the other to accept his/her rights or claims, the parties must obey the rules. The purpose of granting the courts the position of ultimate judge of social disputes is to make the rules enforceable. But under the current system in which tangled influences are exerted by different power organs, it is simply impossible for the courts to act as the ultimate judge of social disputes. The consequences are serious. When we see a case submitted to the courts being used as an occasion for power struggles, when we see different interest groups using the courts as a tool for realizing their own interests, when we see these interests turning the rulings of the courts into useless pieces of paper, we become clearly aware that our society is paying an unnecessary economic, political, and moral price for the absence of an independent and strong judiciary.

Therefore, forging an independent and strong judicial power for the new century is a support for China's current political structure. Any measure of judicial reform in China must pass this test. If the result of a reform is to allow the legislative power to interfere with adjudication, or to turn the judiciary into a tool of the executive power, then such a reform is a failure. An independent and strong judicial power means the state's legal rule is more forceful, more orderly, better regulated, and better represents the people's interests. Why should we avoid it?

## **(2) China Needs a Just and Efficient Judicial Power**

During a discussion early this year with some members of the Chinese People's Political Consultative Conference, President Xiao Yang of the Supreme People's Court pointed out that "justice and efficiency are the themes of the work of the people's courts in the 21<sup>st</sup> century. To ensure judicial justice and enhance judicial efficiency shall be the point of departure and final destination of our work in the new century. They shall be the life and soul of adjudication work."<sup>45</sup>

Viewing justice and efficiency as the "life and soul of adjudication work" shows the

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<sup>45</sup> Liu Xinlei, "Judges Pursue Justice and Efficiency," *Beijing Youth News*, Jan. 9, 2001, p. 6.

positive response of judicial reform to the needs of China's social development in the 21<sup>st</sup> century. With the comprehensive development of the market economy and accession to the WTO, China will see great changes in its economy as well as its way of social life. The space for people's public life will also expand. So far, the government has been the principal pillar in the public domain, but in view of the commitments made by the Chinese Government to the WTO, the functions of the courts will definitely be further strengthened after China accedes to the WTO. The very limited judicial review power currently enjoyed by the courts will be drastically expanded, and judicial power will become another pillar of public power. The development of the rule of law within China and the pluralization of social interests will also push this process. Recently, the Supreme People's Court issued an official reply on the question of the applicable law in a lawsuit triggered by someone going to college in another person's name in Shandong Province. It clearly stated that the court handling this case could directly apply relevant articles of the Constitution, thus breaking the practice of not allowing direct evocation of the Chinese Constitution in lawsuits. This shows signs of "judicial activism" in China.<sup>46</sup>

As the space for judicial power expands, systemic safeguards for judicial justice and efficiency become more and more important. Safeguarding justice requires procedural and substantive laws embodying justice and, more importantly, it requires transparency and openness, which are the most effective means of reducing corruption. On March 8, 1999, the Supreme People's Court promulgated <<A Number of Stipulations Concerning Strict Implementation of the Open Trial System>>, in which it stated courts at all levels "must adhere according to the law to the open trial system, and make sure to have open court sessions, open presentation and examination of evidence, and open announcement of judgments. In cases tried in open court according to law, facts that have not been openly examined in court may not be verified. With the permission of the people's court, journalists may take notes, make audio and/or video recordings, take photographs, and televise live the trial proceedings."<sup>47</sup>

With regard to judicial efficiency, China's <<Criminal Procedure Law>> and <<Civil Procedure Law>> have stipulated time limits for trial of first instance, trial of second instance, and adjudication supervision in criminal and civil cases, and established simplified procedures.

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<sup>46</sup> For related reports, see *Southern Weekend*, Aug. 16, 2001 and Sept. 13, 2001.

<sup>47</sup> Research Office of the Supreme People's Court, ed., *Outline of Five-Year Reform Plan for the People's Courts*, People's Court Publishing House (2000), p. 115.

However, compared with other countries, the scope of cases in which simplified procedures are applicable is still too small. In Great Britain, 97% of criminal cases are tried through simplified procedures, and in Japan 94%.<sup>48</sup> But in China, it is less than 50%. Trying certain difficult cases or cases involving complicated social relations within the time limits provided by the law is almost impossible. However, there are also cases that are very simple and could be handled through the simplified procedures, but thanks to the mobilizing of connections by the litigants to pull strings, simple cases become very complicated and are turned into a contest of the litigants' social power, rendering the courts totally helpless.

The <<Outline of Five-Year Reform Plan for the People's Courts>> has laid down some measures for improving judicial efficiency, such as a rational division of internal labor, establishing a scientific internal management process, requesting courts at all levels to gradually increase the rate of announcing judgments in court, and making judicial rulings publicly available, etc. Some courts are also exploring their own ways of enhancing judicial efficiency, such as examining statistics on cases completed by judges and using them as a factor in promotion.

### **(3) China needs a Judicial Power Respected and Trusted by the Public**

There are two meanings to the social authority and trust enjoyed by the judicial organs. One is that the courts are the ultimate authority for making judgments on social disputes submitted to the courts. The other is that the public approves of the final judgments reached by the courts. Authority in the first sense requires systemic support and safeguards, because the individuals or institutions that infringe upon the final authority of the judiciary are generally more powerful than the judicial organs. For instance, local Party, government, or people's congress leaders are all potential sources of encroachment on the authority of the judiciary. The newspaper <<Southern Weekend>> once reported on a typical case in which a local people's congress abused its power and interfered with the judicial authority, turning into "an empty piece of paper" a case that had been ruled on four times by courts at three different levels in a lawsuit lasting eight years.<sup>49</sup> Such examples can still be found in our midst. It was a single case, but the message it conveyed is: trial and judgment by the court is meaningless. An example like this is enough to wipe out whatever authority a judiciary can

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<sup>48</sup> Bian Jianlin, ed., *Criminal Procedure*, Law Publishing House (1997), p. 358.

<sup>49</sup> Shou Peipei, "Courts at Three Levels, Four Judgments, Eight Years of Litigation, an Empty Piece of Paper," *Southern Weekend*, June 5, 1998, p. 6.

manage to establish by making fair judgments in ten other cases.

The public's approval of judicial authority is the other side of the same coin. The result of a judicial judgment inevitably means that one litigant wins and the other loses. Generally speaking, the winner considers the judgment fair and the loser considers the judgment unfair. Emotional factors aside, acceptance of the courts' judgments requires that the public trust the judicial organs. Under current circumstances in China, why should the public trust the judicial organs, or how can the judicial organs win the trust of the public? First and foremost is certainly justice. In order to be just, the judiciary has to be independent so it can apply the law and make judgments according to the law independently without any outside interference. In order to safeguard this independent status and power and keep it from being abused, there should be mechanisms of accountability for judges and courts. Judges must be a special professional group and the supreme duty of judges and courts must be to be responsible to the law. In order to meet all these requirements, please allow me to return to the previous circular theme: consolidate the constitutional position of the court, forge through reform a strong judicial power for China in the 21<sup>st</sup> century.

## **B. Alternative Dispute Resolution (ADR): How out- of-Court Systems are used as Dispute Resolution Mechanism**

### **1. Overview of the ADR: Types and functions**

According to Chinese law, in the event of civil law and commercial law disputes, the private parties may pursue the following avenues of alternative dispute resolution in settling their disputes: (i) negotiation; (ii) mediation; (iii) arbitration. Of course, in case the negotiation or mediation fails to settle the disputes, and an arbitration clause is not provided in the contract and a written arbitration agreement is not reached afterwards, the parties may bring suit in the People's Court. Therefore, the Civil and commercial dispute resolution channels in China forms a pyramid, in which the negotiation mechanism functions as the bottom tier, the mediation mechanism functions as the second bottom tier, the arbitration mechanism functions as the second top tier, the litigation mechanism functions as the top tier.

#### **(1) Negotiation**

In China, the civil and commercial parties tend to hold negotiation talks between them. The negotiation mechanism encourages the parties to reach agreements on settling their



disputes without the intervention of third neutral parties. Thus, negotiation mechanism is an indispensable part of contractual freedom. Since the two parties are in the best position to know their own interest, the negotiation results could usually satisfy the maximum demands and interest of both parties. Since no third party appears in the negotiation process, the negotiation mechanism is the most confidential technique among all the ADR techniques. Of course, the two parties may focus too much on their own interest and supporting reasons to ignore their opponent's interest and supporting reasons. However, due to the advantages of confidentiality, efficiency and friendship maintaining, the negotiation mechanism is the most predominant channel in resolving the disputes in China. The disputes parties only try mediation, arbitration or litigation after they have not found success in negotiation process.

## **(2) Mediation**

In China, mediation is classified into administrative mediation and private mediation. In administrative mediation process, a government agency acts as the mediator; in private mediation process, a private party, either a natural person, or legal person, including non-governmental organisation, acts as the mediator. Although administrative mediation process exists for the purpose of resolving private disputes, it is less important than private mediation in terms of disputes resolved.

In mediation process, there is a neutral third party assist and facilitate the dispute parties to negotiate each other, and to reach a settlement agreement. In China, there are various categories of mediators, including but not confined to, people's mediators at grass-root level, consumer associations, government agencies, etc.

Like negotiation, mediation also permit maximum private autonomy enjoyed by the parties due to the following factors: First, the mediator is chosen by both parties. Second, both parties are actively involved in the dispute resolution process. Third, the disputes are settled by agreements reached by both parties, not imposed by third parties.

Compared to negotiation, mediation could be made much more organised and effective, as a third neutral party will assist the two parties to identify the best approach to satisfy the needs of both parties. As a Chinese old saying indicates, the parties in question are usually naive, and outsiders are usually informed. Of course, mediation does not work very well in every dispute, as the success of mediation depends upon the co-operation from both parties. If one party refuses or fails in working closely with his opponent and the mediator, mediation will be frustrated. In these circumstances, the parties might need to turn to arbitration or litigation. Among ADR techniques, the mediation mechanism is the second most popular

channel in resolving the disputes in China.

### **(3) Arbitration**

In case the parties are unwilling to solve a dispute through consultation or mediation, or fail to do so, the dispute may, be submitted to a Chinese arbitration body or some other arbitration body. However, the precondition for applying for arbitration is that there is an arbitration clause provided in the contract, or the written arbitration agreement reached by the parties afterwards. The arbitration clause or agreement shall have the following contents: an expressed intent to request arbitration; items for arbitration; and the chosen arbitration commission.<sup>50</sup>

According to the Arbitration Law of 1994, the arbitration award is finally binding on the parties, and the party that is not satisfied with the arbitration award may not bring the case to a people's court. But labour dispute arbitration is an exception. For if the workers involved are not satisfied with the adjudication of arbitration, they may bring the case to a people's court. If they are not satisfied with the judgement of the first instance, they may appeal to the court of second instance. Of course, it is quite burdensome for the workers to follow both arbitration and suite channels.

### **(4) Current situation regarding the use of ADR**

#### **a. Use of negotiation**

In China, most private parties tend to consider negotiation the top priority to pursue in resolving their disputes. The main reasons are that negotiation helps to save the time, financial and other resources for the parties, and to avoid destroying the long-term business or community solidarity built in the business history. For instance, many business corporations in China have established special departments inside the corporations, responsible for processing the consumer complaints.

#### **b. Use of mediation**

Chinese traditional no-litigation culture has promoted the healthy development and maturity of mediation mechanism as an alternative disputes resolution, which has been known as "East Experience" in the eye of westerners. Therefore, both traditional and contemporary societies give special attention to mediation mechanism. For instance, people's mediators at grass-root level, new version of Chinese traditional mediators, are still an indispensable part

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<sup>50</sup> Arbitration Law, Article 16 (1994).

of China's dispute resolution system. As to May of 1999, according to the statistics of Chinese Ministry of Justice, there are nearly 10 million mediators in China. They handled nearly 87,000 civil disputes in 1998. Over the past two decades, they have mediated nearly 130 million civil cases, 5.3 times those handled by courts. Their efforts have also prevented 2.86 million civil disputes from becoming acute, stopped more than 1.5 million attempted suicides provoked by civil disputes and halted 1.3 million civil quarrels from flaring up into criminal cases.<sup>51</sup> Since mediation itself is a product of no-litigation culture, able to save the face for both dispute parties on one hand, and able to reduce the disputes resolution cost, it can be expected that these mediators will continue to play important roles in resolving the civil and commercial disputes. Of course, mediators need further build their intellectual expertise, and get more actively involved in newly emerged industries and social corners.

Table 10: the development of people's mediation

Year	judicature Assistance	mediation committees ( 10 thousand )	mediators ( 10 thousand )	disputes handled ( 10 thousand )
1985	41919	97.7	473.9	633.3
1986	42173	95.8	608.7	730.7
1987	42615	98	620.6	696.6
1988	43618	100.3	637	725.5
1989	45105	100.6	593.7	743.1
1990	47399	102.1	625.6	740.9
1991	52534	104	991.4	712.6
1992	51122	101.1	1017.9	617.3
1993	52979	100.8	976.7	622.3
1994	53705	100.9	999.8	612.4

### c. Use of arbitration

In the 1980s, foreign firms strongly objected to arbitration in China because they did not have confidence in the fairness of Chinese arbitration proceedings or the means of enforcing

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<sup>51</sup> Shao Zongwei, "Mediators face new challenge", China Daily, May 28, 1999.

arbitration awards. By the 1990s, the China International Economic Trade and Arbitration Commission (CIETAC) has become one of the largest business arbitration centres in the world, and is considered to be a fair forum. Since the adoption of Arbitration Law in 1994, many major cities have established independent arbitration bodies. Beijing Arbitration Commission is one of the newly emerged arbitration bodies, and arbitrates around 500 commercial cases annually.

Generally speaking, the parties will voluntarily implement the arbitration award. If one of the parties fails to implement the award, the other party may apply to a people's court for enforcement. If the people's court that has been requested to enforce an arbitration award finds the award unlawful, it shall have the right to refuse the enforcement. If a people's court refuses to enforce an arbitration award, the parties may institute proceedings concerning the contractual dispute in a court.

As far as the speed of dispute resolutions is concerned, most arbitration bodies are able to conclude the resolution of the disputes within a fixed period. The Arbitration Law of 1994 is silent on the time limit requirements for delivering the arbitration award. This issue is always dealt with by the arbitration rules of arbitration bodies. For instance, under Article 48 of the Arbitration Rules of Beijing Arbitration Commission, the arbitration award shall be made within four months dating from the formation of the tribunal of arbitration. Such time limit requirements are often satisfied.

## **2. Parties' viewpoint with regard to ADR**

In contrast with the characteristic of American society, Chinese traditional society has been reluctant to resolve the disputes through litigation. Although development of market economy has stimulated the rapid growth of litigation in China, most Chinese people prefer ADR to litigation. There are various reasons to explain such attitude. However, Confucian no-litigation culture has played a crucial role in shaping parties' viewpoint with regard to ADR.

One of the fundamental characteristics of Confucian vision of law can be summarized as no-litigation preference. In other words, although litigation were heard by the government officials who had both administrative and judicial powers, they were perceived as something undesirable, disgraceful and abnormal, and needed to be eliminated in an ideal society. Confucius himself expressed this argument very clearly: "In hearing litigation, I am like any

other body. What is necessary, however, is to cause the people to have no litigation." <sup>52</sup> The ironical thing was that, Confucius himself was once a judge. However, he did not encourage people to go to court for dispute resolution. In the same line, Fan, a learned subsequent commentator, interpreted no-litigation as the following, "The purpose of hearing a case is to resolve the dispute itself, and block the sources giving rise to disputes". Yang also noted that, "Confucius did not consider hearing cases as a difficult job, rather considered no-litigation among and between the people as the most fundamental issue".<sup>53</sup>

Then, why Confucianism was so enthusiastically pursue a utopia without litigation? Theoretically speaking, such a litigation-disliking attitude could be traced back to the root of Confucianism value system. In the relationship-oriented theoretical framework, Confucius paid special emphasis on the significance of "DE" (ethics, virtue and morality) building for a person who wants to become superior man (JUN ZI).<sup>54</sup> Since ethical requirements are broader, stricter and more comprehensive than legal requirements, no qualified superior man is satisfied with only complying with less rigor legal requirements. Such a characteristic thus remains the fundamental difference between superior man and mean man or small man (XIAO REN). Once people transform themselves into superior men, the whole society will be in harmony and peace, and disputes in society will become less and less. Therefore, less or even no litigation is a necessary condition for a society to become a harmonious and ideal society, so called "Common wealth World"(DATONG SHIJIE). No wonder why Confucius tried his best to persuade people to get rid of litigation as more as possible.

Confucius no-litigation attitude has greatly influenced Chinese mainstream legal philosophy at both official and grass-roots levels from Han Dynasty through late Qing Dynasty even contemporary China. In addition to the consideration of fame or face, a much more important concern is about the political stability possibly brought by litigation. At official level, most emperors and government officials consider diminishing litigation as one of their governing goals. Thus, the number of litigation served as an important yardstick to evaluate the political performance of the local officials. For example, Han Yanshou, a governor of Dongjun in Xi Han Dynasty, attributed the private litigation to his insufficient morality

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<sup>52</sup>Verse 13, Yanyuan 12, LUN YU.

<sup>53</sup> Zhu Xi, Adavance 11, Book 6, ZHUXI JIZHU. See also: <http://read.cnread.net/cnread1/gdwx/z/zhuxi/lyjz/006.htm>.

<sup>54</sup> Chinese concept"君子" could be translated into various counterparts, including but not confined to, "gentleman", "a man of complete virtues" or "superior man". Of course, it is difficult to choose a most appropriate word for the translation purpose.

building. For this reason, he always closed himself inside home, re-examining his faults relevant for the private litigation. Consequently, the parties to the litigation also deeply blamed themselves, eventually, 24 counties within his jurisdiction witnessed no litigation for a period of time since then.<sup>55</sup>

Even the court of justice of Min Guo period in early twentieth century clearly endorsed the no-litigation preference. For instance, the Capital Higher Court of Justice in Nanjing had a horizontal hanging scroll, "Fairness and Justice"(MING JING GAO XUAN), its left couplet saying "the purpose of trial of litigation is to expect no litigation"(TING SONG QI WU SU), and its right couplet saying "the purpose of imposition of punishments is to reduce their imposition"(MING XING FU XU XING).<sup>56</sup>

To guarantee the value of no-litigation preference, the governing class tended to obligate the dispute parties to first exhaust private mediations to settle the disputes. In Song Dynasty, the judges usually tried to mediate between the plaintiffs and the defendants, in order to diminish the litigation. In Yuan Dynasty, it was mandated that, "all the disputes regarding marriage, family property, land and house, debtor's default, unless gross breaches of law, shall be mediated by the local community leader through convincing, in order to avoid the loss and waste in farming". In Ming Dynasty, most minor criminal cases and civil disputes were required to submit to mediation first by county sheriff, local official and clan seniors.<sup>57</sup>

Apart from the resistance of litigation on the part of governing class, grass roots people were also reluctant to bring litigation to the court. There are several reasons to explain their attitude. The first factor is the great concern about the litigation cost arising from motivating a case to the court. Many people got afraid of endless involvement into the litigation process, and inevitable suffering of loss in terms of money and time that would be able to be shifted to farming. While the cost associated with private mediation is very moderate, the cost arising from litigation might be too high to under the parties' control. The second factor is judicial corruption. Judicial corruption had been a big social problem through most Chinese feudal history. There is old saying, "Although the gate of court is widely open, grass roots people should not go there if they only have good reasons, but don't have enough money to bribe the judges there" (GUANFU YAMEN BAZI KAI, YOU LI WU QIAN MO JIN LAI). Although

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<sup>55</sup> Zhang Jinfan, "Several Issues on the World Position of Chinese Legal Culture and its modernization". See, <http://www.cin.hebnet.gov.cn/Others/Rendafazhi/d6j2.html>.

<sup>56</sup> Zhuming, "Minguo Shiqi De Shoudu Gaodeng Fayuan", Tuanjie Bao, November 27, 1999.

<sup>57</sup> See also, Cheng Zongzhang, "Zhongguo Chuantong Shehui Wusong Guan Zairenshi",

there were many sophisticated written codes, most of judges were also the administrative in certain regions; it was very normal for the judges to follow the administrative procedures to hear the case, which was more arbitrary and less open. Arbitrary and less open judicial procedure in return to breed judicial corruption. The third factor is relevant to the concern about potential loss of face or fame. Although litigation cost was not a big problem for the parties, they might be deeply concerned about their potential reputation loss arising from the litigation. Chinese feudal society was a typical agricultural society. The farmers had been living in certain area for succeeding generations and usually kept very close touch each other. They also had to care a lot about the evaluation from other members in terms of family and clan harmony and personal morality. Whatever roles they might play, either plaintiff or defendant, the mere fact of being aliened with the litigation would convey a shamed and disgraceful message to other members in the clan and local community. Although there were litigation in certain periods or regions all the time, it was true that grass roots people generally try to avoid litigation as more as possible. Lack of sufficient litigation incentives also partly explains why attorneys had not created an independent legal profession in Chinese feudal society.

In English, ADR has various nicknames, such as “Adequate Dispute Resolution” or “Avoiding Disastrous Results.” These nicknames have strongly indicated the virtues and advantages of ADR. They are also the common attitude of private dispute parties in contemporary China.

### **3. Problems of the ADR**

ADR is not perfect and is not workable in all the circumstances in China. Rather, all ADR techniques have their disadvantages. As far as negotiation is concerned, either of the two parties could block the negotiation process, and such blocking could happen very frequently especially when one party focuses too much on its own argument and ignores too much about the argument of its opponent. For instance, some business corporations ignoring social responsibility or business ethics, do not want to take into account the reasonable consumer complaint, and therefore force consumers turn to mediation, arbitration or litigation.

In contrast, mediator could make mediation process manageable by pointing out the problems frustrating the negotiation. However, the mediator is neither an arbitrator nor a judge. It means that the dispute parties have the final decision right as to whether to accept the

mediator's suggestion or not. Therefore, many private cases could not be properly settled by mediation in China. For instance, many consumer disputes of small claim are left unsettled due to the failure of cooperation on the part of business or consumers, lack of mediation staff and investigation means, lack of enforcement authority.

Arbitration also has its own disadvantages. First, it is possible that the two parties forget or fail in reaching an arbitration clause in advance, and that the two parties fail in reaching an arbitration agreement afterwards. Second, the arbitration bodies are not necessarily competent enough to hear hundreds of millions of private disputes. For instance, many arbitration bodies focus on hearing commercial disputes of large claim, but unwilling to hear hundreds of millions of consumer disputes of small claim. That is why many local consumer association have begun to establish special arbitration bodies responsible for hearing consumer disputes of small claim.

#### **4. Values in ADR**

ADR functions as a very useful, effective and workable tool in resolving disputes. The values of ADR have already been demonstrated in the past Chinese history, not only by no-litigation culture, but also by the wide use of negotiation, mediation and arbitration in modern times.

The first value of ADR is efficiency and cost saving. General speaking, ADR requires much less resources to be devoted to settle private disputes than litigation. As mentioned above, based on current civil procedure legislation, it takes the parties nine months to get the final court rulings. However, both courts of first instance and courts of second instance are entitled to prolong the trial for due cause. In contrast, either negotiation, mediation or litigation could be concluded within shorter period. Shorter period of dispute resolution usually, if not always, means less cost, and less human resources spent on the dispute resolution process.

The second value of ADR is maximum confidentiality or privacy. When ADR techniques are used, the dispute resolution process is conducted in private, and not open to the public. Nobody except the parties, their attorneys, witnesses, is permitted to observe the dispute resolution process without the consent of both parties. The parties or mediators or arbitrators have no authority to disclose the final settlement results, unless both parties grant the permission. Contrarily, the litigation process must be open to the public, except for the cases involving national secrets, privacy and minors. Even the verdicts of these three kinds of cases must also be announced publicly.



The third value of ADR is maximum private autonomy or contractual freedom. In ADR process, the parties have the final and ultimate control over the procedural and substantive issues, including the selection of specified ADR technique, mediators or arbitrators, and low degree of formality than litigation. In contrast, the litigation parties have less control over the litigation process than ADR process. For instance, the judge is appointed by the court of justice, not by the parties. The litigation process is much more formal than ADR process, and is usually highly structured by set legal rules.

Considering the value of ADR and possible negative effects of litigation, including costly and fame-destroyed consequences for the parties, Chinese traditional no-litigation culture is correct in arguing that litigation mechanism itself is not a value to pursue, even not the best tool to pursue the value of harmony. In recent past years, China adopted the policy of building rule of law. However, many people thought "rule of law" are closely connected with litigation, and consider active litigation as a yardstick to test the progress of rule of law. It is very easy for the people to forget the most fundamental value to pursue while they are busy in suing or being sued each other. Therefore, traditional no-litigation culture is positive in encouraging the private disputes to be resolved more effectively, gracefully and less costly than going to court of justice. Such channels might be negotiation, mediation or arbitration. However, traditional no-litigation culture could not be interpreted as to deny the justification of all litigation. Because in most cases, either plaintiffs or defendants are justified to protect their legitimate interests and rights through litigation, and the justice in individual cases would not be able to realize without litigation process. And Confucius himself did not said he refused to hear cases; what he said was to pursue an ideal society without litigation. Of course, when litigation become inevitable, Confucius would urge the court to hear the cases in efficient and economic way, and exhaust mediation procedure first, and enforce the fair and reasonable judgments as soon as possible. When modern China sets her first step in the track of moving to litigious society, there are always something positive could be learned from Confucius in promoting the growth of ADR mechanism in China.